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SUBJECT: SOUTH AFRICA: GOVERNMENT RELEASES THE SECOND
PHASE OF BEE CODES OF GOOD PRACTICE FOR COMMENT,
INCLUDING AN ALTERNATIVE ON EQUITY FOR MULTINATIONALS

REF: (A) PRETORIA 4854

(B) PRETORIA 4855

(C) PRETORIA 4856

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11. (U) Summary. The South African Department of Trade and Industry (DTI) released for public comment drafts of Broad-based Black Economic Empowerment (BEE) Codes of Good Practice belonging to the second and final phase on December 20, 2005. The Minister of Trade and Industry plans to promulgate both the first (which have been finalized) and the second phases of the BEE Codes of Good Practice before the end of 2006. Of particular importance to the foreign investment community is draft Statement 103, which introduces the concept of "equity equivalents" as a means for multinational corporations to satisfy BEE equity ownership requirements (Ref B). In a recent meeting of their BEE Committee, members of the local American Chamber of Commerce (AmCham) voiced a number of concerns about this draft statement. Members of the U.S.-South African Business Council voiced similar concerns. Comments on all BEE codes of good practice belonging to the second phase must be submitted to DTI by March 31 2006. End Summary.

12. (U) On December 20 2005, the South African Department of Trade and Industry (DTI) released for public comment drafts of BEE Codes of Good Practice belonging to the second and final phase. Comments on these draft codes must be submitted to DTI by March 31 2006. While the BEE Codes of Good Practice belonging to the first phase have been finalized (Refs A, B, and C), the Minister of Trade and Industry will not promulgate them until the codes belonging to the second phase have also been finalized. DTI wants this to occur before the end of 2006.

13. (U) Codes belonging to the second phase deal with employment equity (Code 300), skills development (Code 400), preferential procurement (Code 500), enterprise development (Code 600),

residual contributions (Code 700), and small and medium sized enterprises (code 1000 - 1700). Also included in the second phase are subsections to Codes 000 (the BEE Framework for Measurement) and 100 (BEE Equity). The two subsections for Code 000 deal with misrepresenting BEE status (Statement 001) and verification issues relating to complex structures (Statement 002). The four subsections for Code 100 deal with guidelines for the recognition of BEE ownership by BEE targeted warehouse funds (Statement 102), multinational companies (Statement 103), public entities and organs of the state (Statement 104), and companies limited by guarantee and Section 21 (i.e. nonprofit) companies (Statement 105). All may be sourced from DTI's website: www.thedti.gov.za.

¶4. (U) This cable focuses on Statement 103, which is designed to provide alternatives to BEE equity requirements for multinational corporations. Subsequent cables will address issues of import that the other draft codes present.

Statement 103

¶5. (U) Draft Statement 103 introduces the concept of "equity equivalents" as an alternative for multinational corporations to satisfy BEE equity ownership requirements as set forth in Code 100 (Ref B). Equity equivalents are defined as contributions made by local multinational corporations to a public program or scheme of any government department, provincial government, or local government that has been approved by the

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Minister of Trade and Industry. Equity equivalents would be measured against the value of a particular local business, but at this time it is unclear as to how they would be scored. Equity equivalents will only be available to multinational corporations that do not and never have located their head offices in South Africa. To qualify for equity equivalents, multinational corporations must demonstrate that they:

- own and control 100% of their local enterprise;
- maintain a global policy that uniformly applies restrictions on sharing ownership; and
- would suffer "substantial commercial harm" if they transferred equity as prescribed in Code 100.

Concerns

¶6. (SBU) In a recent meeting of their BEE Committee, members of the local American Chamber of Commerce and members of the U.S.-South Africa Business Council voiced a number of initial concerns about the way draft Statement 103 now reads. They noted that the requirement for multinationals to demonstrate the existence of a "global policy" was unrealistic, since few have actually drafted a policy document stating that they would never sell equity, though it was clearly their practice. Often there are historical or idiosyncratic reasons why a small percentage of multinational businesses are jointly owned. AmCham members questioned whether the government should treat equity equivalents as if they were an operational expense. Raising the cost of doing business would only reduce investment returns and hinder investment - hardly in line with the government's stated objective of raising the growth

rate to 6% by 2014. They questioned the notion that corporations should donate to undefined government programs without having the ability to exercise some control over how those funds might be spent. In addition, many felt that draft Statement 103 seemed to penalize foreign investors rather than provide a reasonable alternative to the sale of equity. This last sentiment was acknowledged by Acting Chief Director for BEE Polo Radebe in a January 20 article in the Mail & Guardian, "People must be careful not to assume that the equity equivalents are the easier alternative. An argument can be made that it is quite an onerous requirement," Radebe was quoted as saying.

Pertinent Definitions

¶17. (U) Draft Statement 103 defined Global Policy as a globally and uniformly applied restriction upon the alienation of equity in or the sale of businesses of the multinational affiliates of a multinational business imposed by that multinational business or by any law of application to the multinational business. Where the global policy is imposed by a regulator or by the law, such global policy must substantially have been in existence prior to the date of promulgation of the Act.

¶18. (U) Draft Statement 103 defined an acceptable valuation standard as the valuation of an asset, an economic interest, a local multinational enterprise, or any other instrument or right which is relevant for measurement.

¶19. (U) Code 000 defines "black" as black, "coloured," and Indian South Africa citizens (or those who could have applied for South African citizenship, if permitted) who suffered or whose descendants suffered discrimination under the

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apartheid regime.

Next Steps

¶10. (SBU) The BEE committee of the American Chamber of Commerce will analyze the draft BEE codes belonging to the second phase and submit comments to DTI on the draft codes on or before March 31 ¶2006. On March 9 2006, AmCham will host a seminar to discuss the draft BEE codes belonging to the second phase. Slated to participate are DTI Deputy Director General for Enterprise and Industry Development Lionel October, Acting Chief Director for BEE Polo Radebe, and Director for BEE Jeffery Ndumo, and Partner at Cliffe Dekker (a local law firm) Kevin Lester. AmCham and the Washington-based U.S.-South Africa Business Council have agreed to exchange views, but to submit separate submissions to DTI. TEITELBAUM